FILED
MAR 11 1968
JOHN F. DAVIS, CLERK

No. 1219

In the

Supreme Court of the United States

OCTOBER TERM, 1967.

PHILLIP SANTORO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Your Petitioner, Phillip Santoro, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 27, 1967 affirming a judgment of conviction of Phillip Santoro previously entered in the United States District Court for the Northern District of California.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit dated December 27, 1967 has not yet been reported; it is reprinted herewith as Appendix A. There was no opinion in the District Court.

JURISDICTION

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on seven counts of an indictment charging him with violations of 18 USC 371 (conspiracy) 18 USC 2312 (interstate transportation of stolen motor vehicles) and 18 USC 2313 (sale of stolen automobiles in interstate commerce). He was sentenced on August 16, 1965 to a term of five years imprisonment on Counts 1, 3 and 4, five years imprisonment on Counts 6 and 7, and five years imprisonment on Counts 8 and 9, each of the five year sentences to run consecutively, thereby accounting for a total of 15 years imprisonment. (R 108).[1]

Appeal was taken to the United States Court of Appeals for the Ninth Circuit. That Court affirmed the judgment of conviction in an opinion filed December 27, 1967.

A petition for re-hearing was timely filed and was denied on February 9, 1968.

The jurisdiction of this Court is invoked under provision of Title 18 United States Code Section 1254(1).

QUESTIONS PRESENTED

1. Was the District Court required to hold an evidentiary hearing on defendant's motion to suppress alleging illegal wire-taps by agents of the government?

2. Was the fairness of defendant's trial in the District Court compromised by the admission into evidence of the post-arrest, post-conspiratorial admissions, confessions

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[1] The record consists of the Clerk's transcript of record, for references to which we have hereinafter used the notation "R", and the reporter's transcript of proceedings in four volumes consecutively paginated for references to which we have used the notation "T".

and false exculpatory statements of co-defendants without sufficient instructions calculated to limit the consideration of such evidence by the jury to the cases of the particular defendants whose statements they were?

STATUTES INVOLVED

18 U.S.C. 371, Conspiracy to commit offense or to defraud United States

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. 2312, Interstate transportation of Stolen Vehicles

> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 2313, Sale or receipt of stolen vehicles

> Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

47 U.S.C. 605, Unauthorized publication or use of communications

> . . . [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . .

STATEMENT

On July 19, 1963, defendant Phillip Santoro, in the company of Joseph Coduto and Peter J. La Magna, co-defendants below, was arrested by agents of the Federal Bureau of Investigation at Thrifty Motors, 1301 East Minor Street, Stockton, California. Later the same day, Dorothy Lee Haynes, also a co-defendant below, was arrested in Stockton. At the time of the arrest, defendant had concluded the sale of two Cadillac automobiles, subsequently determined to have been stolen in Chicago, Illinois, to Thrifty Motors and had in his possession the check of that company in the amount of $9500. (Gov't. Ex. No. 10) The indictment, filed March 6, 1964, (R. 2) charges all four defendants in the first count with conspiracy to transport stolen automobiles in interstate commerce with knowledge that the automobiles had been stolen. Counts Two through Nine charged specific substantive violations against individual defendants involving the sale and interstate transportation of stolen automobiles between April 22, 1963 and the date of the arrest.

In all, six Cadillac automobiles were involved. The government proved on the trial by the testimony of the owners or persons in legitimate possession of these automobiles that each had been stolen somewhere in the Chicago area. (T. 128-196, 232-256) The government also proved by the testimony of the representatives of the three California automobile agencies to whom the cars were sold that some, or all, of the defendants were involved in the sale of each of the cars in California. (T. 335-390) There was also proof in each instance that a false vehicle identification number had been superimposed on the vehicle over the true identification number. (T. 268 et seq.) There was, in addition, testimony of representatives of the Offices of the Secretaries of State of

both Illinois and California pertaining to the procedure used for registering automobiles in their respective states and the actual registration in both states, of the six automobiles involved. (T. 196-232, 256-268) The owner of one automobile, Ralph Sieben, testified that a Phillips Oil Company credit card, (Gov't. Ex. 7) and a Texaco credit card, (Gov't. Ex. 8) were in the glove compartment of his vehicle at the time it was stolen. (T. 155) These two exhibits, in addition to a purported Illinois driver's license in the name of Ralph Sieben (Gov't. Ex. 9) which the proof indicated was counterfeit (T. 963-978) were seized from the defendant Santoro after his arrest and admitted into evidence. (T. 500)

Prior to trial, a motion was made on behalf of all the defendants including Santoro to suppress evidence on the ground that it had been obtained through the use of telephone wire-tapping, unlawful under 47 U.S.C. § 605, by agents of the Federal Bureau of Investigation. (R. 62) Counsel offered to support the motion by the affidavit of Santoro as well as an individual named Ann Moreno. Both affidavits refer to a telephone call placed by defendant Santoro from the San Joaquin County Jail after his arrest and Miss Moreno's affidavit stated further that Federal Bureau of Investigation agents subsequently interviewed her and unmistakably exhibited knowledge of the contents of the telephone call from Santoro. No hearing was held in the Court below on this motion. The factual situation in respect to this motion to suppress is complicated by the existence of a prior indictment, No. 13767 in the District Court, which was eventually superseded by the instant indictment. Pre-trial motions, however, had been made under the prior indictment and had been heard by the Court, Judge Halbert presiding. No evidentiary hearing was held on the motion to suppress

in that case either; however, the Court did set a time and place for such a hearing. After the return of this indictment, similar, if not identical, pre-trial motions were advanced by defendants and these were considered by the Honorable Thomas J. McBride, Judge of the District Court on May 5, 1964. (T. 12 et seq.) After an extended discussion of the motion to suppress the Court, Judge McBride stated that he would give counsel for the defendants an opportunity to determine whether there was factual evidence justifying the charge of illegal wiretapping. (T. 46) In ruling on all the pre-trial motions, however, Judge McBride merely took the motion to suppress under submission. (T. 57) When the case came on for trial, on June 21, 1965, before Judge Halbert, the motion to suppress was again renewed by trial counsel for defendants prior to the commencement of the trial. (T. 81 et seq.) After counsel stated his intention to produce evidence upon the motion to suppress, the Court suggested that the motion was late, (T. 83) and an extended discussion followed in which the government took the position that the Court was not bound to hold a hearing on the motion to suppress because the motion had not been perfected by the introduction of evidence during the extended period between indictment and trial. The attorney for the government suggested the reservation of the motion until trial when any issue of telephonic interception could be raised in connection with any specific evidence the government introduced. The motion was taken under advisement by Judge Halbert and on June 22, 1965, the following day, when the case was called for trial, the Court ruled as follows:

> "Secondly, as to motion for—at least tentative motion for a further hearing on the motion to suppress, that motion is denied, but it may be renewed during

the course of the trial of the case, and you are ready to proceed, I assume, with the trial of the case at 10:00 o'clock?" (T. 102)

After the jury was selected and sworn, counsel for the defendant advanced an additional motion to suppress all of the evidence in the case based upon illegal wiretapping and further for a hearing in the absence of a jury on this issue; that motion was similarly denied. (T. 105) Counsel again moved to suppress at the conclusion of the Government's case-in-chief. (T. 534) After discussion of counsel's proffer of evidence on the motion, the court denied it. (T. 555) At the conclusion of all the evidence the motion was again renewed (T. 995) and again denied. (T. 998) After verdict the question was again included in defendant's written motion for a new trial. (R. 100) The record then indicates that no evidentiary hearing was ever held under this indictment and no opportunity was ever afforded defendants to question the appropriate agents of the Federal Bureau of Investigation to determine whether or not information gained by telephonic intercepts, illegal under 47 U.S.C. § 605, if indeed any such there were, contributed in any respect to the development of the evidence presented by the government and relied upon to sustain the conviction of defendant.

In addition to the evidence summarized above, the government closed its case with the testimony of three F.B.I. agents to the statements of each of the four defendants made after their arrest on July 19, 1963. (T. 438-531) The three male defendants who were first arrested were taken to the office of the Federal Bureau of Investigation and interrogated separately. LaMagna made a statement which was reduced to writing at that time and

place and admitted as Government's Exhibit 62. (T. 477) The same defendant was questioned further on the following day at the San Joaquin County Jail and a second statement was taken which was admitted into evidence at Government's Exhibit 63. (T. 479) Both statements concerned the defendant Santoro and indicated that his was a central role in the scheme. Similar remarks by the defendant Coduto after his arrest were admitted into evidence although they had not been reduced to writing. (T. 438 et seq.) In connection with the Coduto statements, the Court *sua sponte* instructed the Jury at the time of the testimony concerning those statements, that the Jury was not to consider such statement against any defendant but Coduto.

> "The Court: Now, ladies and gentlemen of the jury, I will on my own motion tell you that any statement made by one of these defendants after this alleged offense occurred is binding upon that defendant and that defendant alone. In other words, it is not binding upon the other defendants." (T. 448)

The defendant Haynes, arrested later in the same day, also was interrogated and her false exculpatory statement was admitted into evidence without limiting instruction, although it concerned the defendant Santoro. (T. 506-511)

REASONS FOR GRANTING THE WRIT

1. The Failure to Conduct an Evidentiary Hearing on the Wiretap Issue.

No hearing was held in the Court below upon the motion to suppress evidence advanced by the defendant Santoro and based upon his allegations of wiretapping. If telephone intercepts of the kind which are unlawful under 47 U.S.C. 605 contributed to the investigation of the case against Santoro by the Federal Bureau of Investigation, such evidence as the government developed, either directly or derivatively, from such intercepts unquestionably should have been suppressed and excluded. *Nardone* v. *United States,* 308 U.S. 338. The question in this case, therefore, simply stated, is whether a hearing should have been held outside of the presence of the jury to explore the wiretapping question thoroughly. It is no answer to say that defendant was afforded such an opportunity in a prior case on which he was never brought to trial. We contend that the District Court was bound at some stage of the proceedings in this case below to hold such a hearing.

In the course of its opinion per Circuit Judge Barnes, the Court of Appeals stated:

> "The evidence upon which the government's case rests appears on its face to have been wholly unrelated to the single alleged post-arrest tap and to have been the product of normal investigation . . ."

It is just such a determination that we believe two recent decisions of this Court require to be made after an evidentiary hearing in the District Court upon findings of fact bottomed on evidence adduced by the parties for

that purpose. In *Kolod* v. *United States*, ... U.S. ..... 19 L.Ed.2d 962 (Jan. 29, 1968) this Court stated:

> "We cannot accept the Department's ex parte determination of relevancy in lieu of such determination in an adversary preceedings in the District Court." 19 L.Ed.2d 962, 964

That case, as well as *Hoffa* v. *United States*, 387 U.S. 231, involved the disclosure of electronic eavesdropping activity by the government. In this case no such disclosure has yet been made. Certainly, however, if no intercept, in violation of 47 U.S.C. Section 605, occurred, then defendant is hardly in a position to prove any such intercept at a hearing. We contend merely that Santoro is entitled to:

> "[A]n opportunity to establish, if he can, that the interception of this particular conversation, or of some other conversations, vitiated in some manner his conviction." *Hoffa* v. *United States*, 18 L. Ed. 2d 738, 741.

The opinion of the Court of Appeals would place upon a defendant in a criminal case the burden of identifying with specificity the precise evidence which he contends to have a tainted source as a prerequisite to the conduct of an evidentiary hearing calculated to prove or disprove just that. We think this is an unfair burden. Defendants, and their counsel, are very seldom privy to the illegal activities of governmental agents. The only practical method whereby a defendant could make any showing that evidence relied upon by the government is tainted by wiretaps, either directly or derivatively, is to elicit from the particular agents of the government under oath precisely what their activities were in this connection and what use has been made of the results thereof. This

case provides an illuminating example. If, as the Court of Appeals appears to have assumed, the conversation was overheard at the San Joaquin County Jail, it may well be that it did not contribute to the development of the evidence against petitioner. It is also possible, however, that the conversation was overheard as a result of illegal activities of governmental agents or even local police in Chicago, Illinois. If that be true, conversations overheard by such means in the past may very well have contributed in a derivative manner to the development of the evidence that the government relied upon to convict petitioner.

It is our contention, accordingly, that the Court of Appeals in the instant case has decided a substantial federal question in a manner inconsistent with this Court's decisions. We respectfully ask this Court to take the same action here it took in *Kolod* v. *United States.*

2. The Post-Conspiracy Declarations of Co-Defendants.

The statements of the co-defendants LaMagna and Haynes which were admitted without limitation by the Court below were made to agents of the Federal Bureau of Investigation after the arrest of those co-defendants as well as the defendant Santoro on July 19, 1963. We contend, consequently, that these statements amount to post-conspiracy declarations and are, accordingly, not binding upon defendant Santoro nor admissible against him. The problem posed by the admission of such statements was given extensive consideration by this Court in *Delli Paoli* v. *United States,* 352 U.S. 232. In that case involving a conspiracy to possess and transport non-tax-paid alcohol, a full confession of a co-defendant implicating Delli Paoli was admitted into evidence and the con-

viction was affirmed largely because of the meticulous care with which the trial judge instructed the jury limiting the reception of that evidence to the issue of the guilt or innocence of the confessing co-defendant and specifically admonishing the jury not to consider this evidence against Delli Paoli. The opinion in that case set out the following quotation from *Lutwak* v. *United States*, 344 U.S. 604, 617-619:

> "'The Court must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only. Therefore, when the trial court admits against all of the conspirators a relevant declaration of one of the conspirators after the conspiracy has ended, without limiting it to the declarant, it violates the rule laid down in *Krulewitch*. [*Krulewitch* v. *United States*, 336 U.S. 440.] Such declaration is inadmissible as to all but the declarant . . .'" *Delli Paoli* v. *United States*, 352 U.S. 232, 238.

There is no question that the particular evidence admitted in this case is of the same basic character as that in *Delli Paoli*. It would serve no point to proliferate citation and discussion of the decided cases supporting the inadmissibility of post-arrest statements of co-conspirators without limiting instructions because the rule seems sufficiently well-established not to require that sort of extended discussion.

The question, then, involves essentially the sufficiency of the Court's instructions as clear, forceful and meticulous directions to the jurors not to consider the statements of the co-defendants when determining the guilt or innocence of Santoro. While there may be some basis for a belief in the efficacy of such instructions as were given in the *Delli Paoli* case, that basis evaporates when the

character of the instructions given in this case is considered. In his only roughly contemporaneous instruction, referring to the post-arrest statement of Coduto, but not to those of LaMagna or Haynes, the trial judge spoke of the statement as ". . . [B]inding upon that defendant and that defendant alone. . . ." The jury was told, "[I]t is not binding upon the other defendants." That instruction did not tell the jury not to consider the evidence when determining Santoro's guilt or innocence. The sophisticated concept implicit in the words "binding upon" is difficult of application and definition by trained lawyers and judges, not to speak of a lay jury. Such a charge appears calculated to protect the record, rather than the defendant.

Two portions of Judge Halbert's final instructions to the jury touched upon this issue:

> "Except in the case of the offense of conspiracy, the charge in Count One of the indictment, an admission or incriminatory statement made outside of Court by one defendant may not be considered as evidence against any other defendant not present when the statement was made." (T. 1029)

and:

> "No act or declaration of a conspirator which is committed or made after the conspiracy has been terminated, for instance by its purpose having been fully accomplished or by its objective having ended, is binding upon his co-conspirators and they are not criminally liable for any such acts or declarations." (T. 1045)

Accordingly, while the second quoted portion of the charge may have been unobjectionable, if somewhat bland, what little protection it would afford defendant Santoro was completely undercut by the first quoted portion of

the charge which could well have left the jury under the impression that the objectionable evidence could be considered against the defendant Santoro on the conspiracy count but not on the substantive count, a conclusion without any basis in law and a result precisely contrary to the teachings of *Krulewitch* v. *United States*, 336 U.S. 440. Such a charge is no substitute for the kind of emphatic and specific limiting instruction contemplated by *Delli Paoli* v. *United States*, 325 U.S. 232.

This conclusion, moreover, is buttressed by a consideration of the fundamental and underlying rationale supporting this Court's decision in *Delli Paoli* v. *United States*, 352 U.S. 232. The opinion contains its own justification:

> "It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instruction, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice." 352 U.S. 232, 242.

So that Court decided that confessions of co-defendants could be admitted with proper limiting instructions because of the essential place in our system for an abiding faith that jurors will follow the court's instructions when they are clear, unambiguous and simple. To say that the lack of such instructions amounts to harmless error is precisely to contradict that faith. A jury cannot follow clear and simple instructions when the judge does not give them. If the basic premise of our jury system be

that the jury will follow instructions then it is clear that in the absence of instructions it must be an equally basic premise that the jury will consider all of the evidence presented upon the trial. If such error did not affect the substantial rights of Phillip Santoro it must be either because the jury did not follow the instructions given to it or because it would not have followed proper instructions had they been given. Such a conclusion is at war with the reasons underlying the decision in *Della Paoli*.

The situation presented here underscores the need for this Court to provide guidelines to the solution of this ever recurring problem of federal criminal justice. We respectfully submit that the issue is worthy of review by this Court in the exercise of its supervisory power over the administration of criminal justice in the courts of the United States.

CONCLUSION

For the reasons expressed above we believe this case worthy of review in this Court. We repectfully petition this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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